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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re)	Case No. 08-31810-A-13G
FOSTER and TERESA BROOKS,)	Docket Control No. SBS-1
)	Date: May 4, 2009
Debtors.)	Time: 9:00 a.m.
)	

MEMORANDUM

This Memorandum supplements the court's ruling appended to the minutes of the May 4 hearing¹ on the motion to confirm the first amended plan.

Creditor Scott Brooks was the sole objector to confirmation of the first amended plan. He believes that the debtors have not

¹ The minutes, item 165 on the docket, erroneously state that they are for the hearing on April 6. Also, the ruling appended to the minutes addresses the first amended plan without the further amendment made at the May 4 hearing. Originally, the first amended plan provided for a 100% dividend to Class 7 nonpriority unsecured creditors, plus interest. This was changed at the hearing (as indicated in the confirmation order). Instead, Class 7 unsecured creditors will receive a dividend only if the debtors recover on their claim against Scott Brooks. In the event of a recovery, nonpriority unsecured creditors will receive as much as payment in full plus interest at the federal judgment rate. If there is no recovery, these creditors will be paid nothing.

1 proven that the plan is feasible. See 11 U.S.C. § 1325(a)(6).

2 As the plan was further amended at the May 4 confirmation
3 hearing, unsecured creditors will not be paid a dividend unless
4 the debtors are successful in the pending state court litigation
5 against Scott Brooks. In that event, unsecured creditors will
6 receive any recovery up to the full amount of their claims, plus
7 interest at the federal judgment rate.

8 It was conceded at the confirmation hearing that absent a
9 viable claim against Scott Brooks, unsecured creditors would not
10 be entitled to a dividend. That is, if this case were proceeding
11 under chapter 7, absent a litigation victory against Scott
12 Brooks, there would be no nonexempt assets to fund the payment of
13 the claims of nonpriority unsecured creditors. See 11 U.S.C. §
14 1325(a)(4). Therefore, in order to satisfy section 1325(a)(4),
15 the proposed plan need only promise to pay unsecured creditors
16 whatever is recovered in the litigation.

17 The state court litigation parallels a dischargeability
18 complaint, Adv. No. 08-2685, filed by Scott Brooks. This court
19 earlier modified the automatic stay to permit all parties to
20 litigate their claims against one another in state court, and it
21 stayed the adversary proceeding pending completion of the state
22 court litigation.

23 A victory by Scott Brooks in state court will have two
24 likely consequences for the debtors' chapter 13 case. First,
25 there will be nothing to pay to unsecured creditors. Second,
26 this court must next determine whether the state court judgment
27 is a nondischargeable obligation of the debtors.

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1 On the other hand, if the debtors prevail against Scott
2 Brooks, two other consequences are likely to follow. First,
3 Scott Brooks will not have a claim against the debtors. Second,
4 unsecured creditors will be paid from any recovery against Scott
5 Brooks.

6 Hence, whatever the result of the state court litigation,
7 Scott Brooks is unlikely to receive a dividend in this chapter 13
8 case.

9 This possible result squares with the confirmation
10 requirements imposed by sections 1322(a) and 1325(a). See 11
11 U.S.C. §§ 1322(a) & 1325(a).

12 As to feasibility (see 11 U.S.C. § 1325(a)(6)), the debtors
13 need not prove that they are likely to prevail in state court
14 against Scott Brooks. Their plan does not depend on any such
15 recovery to fund the payment in full of priority claims (see 11
16 U.S.C. § 1322(a)(2)) or secured claims (see 11 U.S.C. §
17 1325(a)(5)(B)). These dividends will be paid from income sources
18 other than a litigation recovery. No challenge was raised to the
19 dependability of these other income sources.

20 And, because it was conceded at the confirmation hearing
21 that unsecured creditors would receive no dividend if this case
22 proceeded under chapter 7 absent a recovery by the debtors
23 against Scott Brooks, satisfying section 1325(a)(4) requires only
24 that the plan provide for the payment of any recovery to
25 nonpriority unsecured creditors. The debtors do not have to
26 prove they can fund a "best-interests-of-creditors" dividend
27 because none is required absent a litigation recovery.

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1 Thus, even if the debtors had no claim against Scott Brooks,
2 their plan could be confirmed. Their regular income funds all
3 necessary dividends payable to priority and secured creditors,
4 and nonpriority unsecured creditors would be entitled to nothing.

5 Put differently, if this court concluded that the debtors'
6 claim against Scott Brooks had no value, or that the debtors had
7 no chance of success, the plan could still be confirmed. Without
8 that claim, unsecured creditors would receive nothing in a
9 chapter 7 case and therefore section 1325(a)(4) does not require
10 any dividend in a chapter 13 case.

11 Dated: 2 June 2009

By the Court



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14 Michael S. McManus, Judge
United States Bankruptcy Court
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CERTIFICATE OF MAILING

I, Susan C. Cox, in the performance of my duties as a
judicial assistant to the Honorable Michael S. McManus, mailed by
ordinary mail to each of the parties named below a true copy of
the attached document.

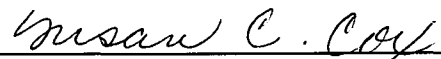
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Dated: June 2, 2009



Susan C. Cox
Judicial Assistant to Judge McManus